IN THE SUPREME COURT OF THE

UNITED STATES
October Term, 1978

No. 78-1537

NED GEORGE FORMAN,

Petitioner,

v.

CHARLES L. WOLFF, JR., et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondents do not contest Petitioner's reliance on 28 U.S.C. §1254(1) as a jurisdictional basis for this proceeding.

STATEMENT OF THE CASE

On April 29, 1974, Petitioner entered a plea of guilty in state court to a charge of sale of cocaine. He was thereafter sentenced to a term of fifteen years in the Nevada State Prison.

Some two years after Petitioner's plea of guilty, the Nevada Supreme Court handed down its decision in **Hass v. State**, 92 Nev. 256, 548 P.2d 1367 (1976). In **Hass**, the Court considered the aggravated predicament of an adult individual who had been sentenced to life in prison for selling viable marijuana seeds to a person under twenty-one years of age. Had the defendant-seller been under twenty-one years of age, he would have faced a possible penalty of imprisonment for not less than one nor more than twenty years, with possibility of probation. He was instead given a life sentence as he, being over the age of twenty-one years, sold a controlled substance to a person under the age of twenty-one years. (See NRS 453.321—Appendix.) Noting that the defendant's age was determinative of the applicable sentencing provisions, the Nevada Supreme Court concluded that age should thereafter be viewed as an essential element of the crime of sale of a controlled substance. The **Hass** opinion, however, gave no indication as to retroactive application, application in the context of a guilty plea, or whether, within both retroactive and prospective contexts, the principle announced therein would extend to cases in which the State had not secured or would not seek an enhanced penalty.

Petitioner placed principal reliance on **Hass** in a subsequent and initially successful bid for post-conviction habeas corpus relief in the Nevada courts. Despite the fact that Forman had entered a plea of guilty and had not been sentenced in accordance with the enhanced penalty provisions of the Nevada sale statute, a state district judge granted habeas corpus relief.

The State filed an appeal in accordance with the terms of NRS 34.380(7). (See Appendix.) During the pendency of the State's appeal, the Nevada Supreme Court announced its decision in **State v. Wright**, 92 Nev. 734, 559 P.2d 1139 (1976). The Nevada Supreme Court there reconsidered its prior holding in **Hass**, concluded that **Hass** was "improvidently decided", and held that the prosecution would not thereafter be required to plead and prove the age of a defendant in a sale case.

The Court announced its decision in **Wright** on December 30, 1976. That same day, the Court summarily reversed district court orders granting habeas relief to six other prisoners who had used the short-lived **Hass** decision to secure collateral relief. The Petitioner's case was listed among the aforementioned summary reversals. See **Warden v. Forman**, 92 Nev. 739, 558 P.2d 1141 (1976) and other similar cases collected at 92 Nev. 737-741 and 558 P.2d at 1141-1142. The full text of the per curiam decision handed down in Petitioner's case read as follows:

> On the authority of, and for the same reasons stated in, State v. Wright, 92 Nev. 734, 558 P.2d 1139 (1976), we, **sua sponte**, reverse the district court's order which granted respondent's petition for a writ of habeas corpus.
> (92 Nev. at 739-740.)

The Petitioner next sought relief in the federal courts alleging, inter alia, that the Nevada Supreme Court's reliance on **Wright** in deciding the State's appeal of his habeas action was violative of the ex post facto provisions of the Federal Constitution. Petitioner was denied relief in both the district and circuit courts. This action follows.

REASONS FOR DECLINING REVIEW

The ex post facto language of Article I §9 of the Constitution limits legislative power and does not of its own force govern judicial pronouncements. **Marks v. United States**, 430 U.S. 188, 97 S.Ct. 990, 992 (1977). This Court, however, has seen fit on rare occasion to extend an ex post facto analysis to judicial pronouncements. **Marks v. United States**, supra; **Bouie v. City of Columbia**, 378 U.S. 347 (1964); **James v. United States,** 366 U.S. 213 (1961). In each instance, this Court set aside an existing conviction where an appellate court's unforeseeable expansion of substantive criminal law left the accused subject to liability for conduct not defined as criminal at the time of commission of the act or acts resulting in prosecution.

The panel decision at issue here made note of the limitations inherent in this Court's prior decisions and concluded that the "fair warning" analysis underlying the **Marks-Bouie-James** trilogy had no application here as the Petitioner, at the time of commission of the crime charged, had adequate notice of the standard by which his conduct would be and was in fact measured and punished.

Petitioner now asks this Court to reject the panel's analysis, suggesting that the Nevada Supreme Court's terse disposition of his appeal included application of a rule not in effect at the time he secured habeas corpus relief in the state district court.

Any determination as to the existence of a denial of due process, regardless of the origin of the claim, presupposes proof of prejudice, or at the very least, circumstances supporting a presumption of prejudice. The Petitioner cannot prove prejudice here; nor can he marshal facts pointing to potential for prejudice.

Following Forman's plea of guilty, the Nevada Supreme Court addressed an aggravated fact pattern that prompted a decision later deemed improvident. During the hiatus between **Hass** and **Wright**, the Petitioner managed to convince a state district court judge that the principle espoused in **Hass** should be extended to his case. As noted earlier, the Nevada Supreme Court had given no indication that **Hass** would be applied retroactively, particularly in the context of a guilty plea that had not resulted in the imposition of an enhanced penalty. The fact that the Nevada Supreme Court would not have extended **Hass** to the Petitioner's case is best evidenced by the Court's later unqualified reversal of **Hass.**

It is apparent that the Petitioner's argument focuses on the methodology employed by the Nevada Supreme Court in treating his case. Had that Court acknowledged its reversal of **Hass** and then gone on to note that **Hass** would not have been extended to Petitioner's case in any event, Petitioner would have no basis for even suggesting an ex post facto violation. [1]

The fact that the Nevada Supreme Court did not employ what may in retrospect appear to be better appellate methodology does not require federal habeas intervention. Intervention on the basis of such a transparent claim would result in this Court abandoning its historically restrained practice of assessing true constitutional prejudice in favor of forcing a state appellate court to engage in an academic exercise having no practical constitutional significance.

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1. As noted earlier, the unqualified reversal of **Hass** is proof positive that the Nevada Supreme Court would not have extended **Hass** to the fact pattern involved in Petitioner's case.

Were this Court to accept Petitioner's narrow technical argument, it could not seriously be suggested that the Nevada Supreme Court would thereafter be barred from recalling its opinion in Petitioner's case and reconsidering the question of whether the **Hass** decision, assuming its continued vitality, would have been applied to guilty pleas not resulting in the imposition of an enchanced penalty. Cf. **Hankerson v. North Carolina,** 432 U.S. 233, 97 S.Ct. 2339 (1977), concurring opinion of Mr. Justice Blackmun, 97 S.Ct. at 2346. In the event of such a remand, the outcome would be inevitable. As the Nevada Supreme Court has already expressly overruled **Hass**, there is little if any likelihood that the Court would accept Petitioner's claim that the state district court judge properly extended **Hass** behond its unique facts to a prior plea of guilty that did not result in imposition of an enhanced penalty. In short, Petitioner asks this Court to exercise its jurisdiction in support of what must be characterized in the final analysis as semantic exercise.

CONCLUSION

Petitioner's demand for relief rests on a tightly woven constitutional argument that suffers from one principal defect. The Petitioner can show no prejudice; nor can he demonstrate how this Court's intervention would be of any practical consequence given the particular facts of this case. Accordingly, Respondents respectfully request that the petition be denied.

Respectfully submitted,

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APPENDIX

STATE STATUTORY PROVISIONS INVOLVED

Nevada Revised Statutes:

453.321: Offenses and penalties: Prohibited Acts; Penalties.

"1. Except as authorized by the provisions of NRS 453.011 to 453.551, inclusive, it is unlawful for any person to sell, exchange, barter, supply or give away a controlled or counterfeit substance.

"2. Any person 21 years of age or older who sells, exchanges, barters, supplies or give away a controlled or counterfeit substance in violation of subsection 1 classified in:

"(a) Schedule I or II, to a person who is:

"(1) Twenty-one years of age or older shall be punished by imprisonment in the state prison for not less than 1 year nor more than 20 years and may be further punished by a fine of not more than $5,000 . . . .

"(2) Under 21 years of age shall be punished by imprisonment in the state prison for life with possibility of parole and may be further punished by a fine of not more than $5,000 . . . .

"3. Any person who is under 21 years of age and is convicted:

"(a) Of an offense otherwise punishable under subsection 2 shall be punished by imprisonment in the state prison for not less than 1 year nor more than 20 years, with possibility of probation . . . . ."

34.380: Writ granted by supreme court or district courts; appeal on denial or granting of the writ.

. . . .

"7. The State of Nevada is an interested party in habeas corpus proceedings, and, in the event the district judge or district court to whom or to which an application for a writ of habeas corpus has been made shall grant such writ, then the district attorney of the county in which the application for the writ was made, or the city attorney of a city which is situated in the county in which the application for the writ was made, or the attorney general in behalf of the state, may appeal to the supreme court from the order of the district judge granting the writ and discharging the applicant; but such appeal shall be taken within 15 days from the day of entry of the order.

. . . ."